DAEWOO CORPORATION

v.

BAUER (MALAYSIA) SDN BHD (NO 2)

HIGH COURT MALAYA, KUALA LUMPUR
NIK HASHIM J
[ORIGINATING SUMMONS NO: R3-24-86-98]
23 APRIL 1999

CIVIL PROCEDURE: *Res judicata - Second originating summons over same issue as first originating summons - Whether res judicata applied - Whether different causes of action - Whether plaintiff had a duty to join all causes of action in a single action - Rules of the High Court 1980, O. 15 r. 1(1)(a) - Whether plaintiff should have applied to consolidate 2nd originating summons - Rules of the High Court 1980, O. 4 r. 1(1) - Exclusion of res judicata - Special circumstances - Plaintiff's success in first originating summons*

CIVIL PROCEDURE: *Originating summons - Striking out - Res judicata - Filing of unconditional appearance, notice of counterclaim & affidavits in reply by defendant - Whether constituted a fresh step in proceedings - Whether defendant barred from striking out originating summons*

The plaintiff was the main contractor and the defendant the sub-contractor in respect of 13 work orders. Disputes and differences arose between the parties on the 13 work orders and these were referred to arbitration. An arbitrator was appointed accordingly. However, the said arbitrator's jurisdiction was challenged by the plaintiff. In an application to the court ('the 1st OS'), the plaintiff obtained a single injunction in respect of 8 of the work orders, *ie*, that the said arbitrator did not have the jurisdiction to arbitrate the said work orders. The plaintiff did not include 4 of the remaining work orders in the 1st OS, even though reference was made to them.

In this instance, the plaintiff brought second proceedings against the defendant ('the 2nd OS') over the same subject matter of arbitration in relation to the 4 of the remaining work orders.

The defendant pleaded *res judicata* as the subject matter of the 2nd OS was the same as the 1st OS and cited the rule in *Hendersen v. Hendersen* in support. The defendant contended that the plaintiff should have included the 4 work orders in the 1st OS. As such, the filing of the 2nd OS was an abuse of process and ought to be dismissed.

Against this, the plaintiff submitted that the defendant's filing of unconditional appearance, notice of counterclaim and an affidavit on merits constituted a fresh step in the proceedings and as such debarred the defendant from

challenging the plaintiff's 2nd OS. Further, the plaintiff claimed that the 4 work orders were separate and distinct contracts with different causes of action from the 8 work orders in the 1st OS and as such the doctrine of *res judicata* did not apply. Also, that the doctrine could only be invoked against a litigant who lost the 1st proceedings. As the plaintiff won the 1st proceedings, the doctrine did not apply.

Held:

[1] By filing the three matters in response to the plaintiff's 2nd OS, the defendant did not waive its right to challenge the said OS. This was because the defendant's preliminary objection was based on the plaintiff's abuse of process of the court by its filing of the 2nd OS.

[1a] The defendant's counterclaim was a separate and independent action of the plaintiff's claim in the 2nd OS. The defendant was asking for the opposite relief and it was therefore not an affirmation of the correctness of the plaintiff's claim in the 2nd OS. Likewise, the act of filing of the affidavits by the defendant. The defendant's affidavits disputing on the merits and raising the preliminary issue were filed with a purpose, *ie*, to dismiss the 2nd OS.

[2] The parties to a litigation would not (except under special circumstances) be permitted to open the same subject of litigation in respect of a matter which might have been brought forward in that earlier litigation but was not brought forward. The doctrine of *res judicata* applied, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time (*Henderson v. Henderson*).

[3] Estoppel of cause of action is extended to all other causes of action (based on the same facts or issues) which should have been litigated or asserted in the original earlier action (*Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd*).

[4] The 4 work orders in the 2nd OS were based on the same issue concerning arbitration between the same parties, *ie*, the defendant and the plaintiff. The arbitrator was appointed for all the 13 work orders. If the 8 work orders could be litigated in one proceeding under the same subject matter of arbitration in the 1st OS, there was no reason why the 4 work orders in the 2nd OS could not be included in the 1st OS. Further, since reference was made to the 4 work orders in the 1st OS, they should have been included in the 1st OS and claimed for relief accordingly.

[5] The plaintiff, having initiated the 1st OS, had a duty to join all causes of action against the defendant in a single action pursuant to O. 15 r. 1(1)(a) Rules of the High Court 1980. Further, the plaintiff could have applied to amend the 1st OS to include the 4 work orders and this was not done. Also, the plaintiff could have taken out a 2nd OS for the 4 work orders and have them consolidated pursuant to O. 4 r. 1(1) Rules of the High Court 1980. This course, too, was not adopted by the plaintiff.

[6] The role of the parties, be that of the plaintiff or defendant, and the success or failure of the parties is not the operation of the doctrine. The defendant, though a losing party in the 1st OS could raise the question of abuse against the plaintiff's failure to include the 4 work orders in the 1st OS.

[7] The decision in *Asia Commercial Finance* applied to the 2nd OS. The plaintiff was not entitled to rely on the special circumstances proviso in *Henderson* as this was not recognised in *Asia Commercial Finance*. Even if the plaintiff was entitled, the plaintiff had not, on the facts invoked the exception.

[8] The 2nd OS was clearly an abuse of process of the court and could not be litigated upon.

[Preliminary objection allowed; 2nd OS struck out with costs. Defendant's counterclaim set for trial to a date to be fixed.]

Case(s) referred to:

Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 MLJ 189 ***(foll)***

Brisbane City Council v. Attorney General for Queensland (PC) [1978] 3 WLR 299 ***(refd)***

Divine-Bortey v. Brent London Borough Council, The Gazette 3 June 1998, 29 ***(refd)***

Eagle Star Insurance Co Ltd v. Yuval Insurance Co Ltd [1978] Vol 1 Part 4, 357 ***(refd)***

Greenhalgh v. Mallard [1947] 2 All ER 255 ***(refd)***

Henderson v. Henderson [1843] 3 Hare 100 ***(refd)***

Kluang Wood Products Sdn Bhd & 1 lagi v. Hong Leong Finance Bhd & 1 lagi, Rayuan Sivil No. 02-287 Tahun 1994 ***(refd)***

New Brunswick Railway Company v. British and French Trust Corporation, Ltd. [1939] AC 1 ***(refd)***

Superintendent of Pudu Prison & Ors v. Sim Kie Chon [1986] 1 MLJ 494 ***(refd)***

Talbot v. Berkshire County Council [1993] 4 All ER 9 ***(refd)***

Yat Tung Investment Co Ltd v. Dao Heng Bank Ltd [1975] AC 581 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 15 r. 1(1)(a), O. 4 r. 1(1)

For the plaintiff - MK Chen; M/s Azman, Davidson & Co
For the defendant - RR Sethu (Swee Im Tan with him); M/s David Chong & Co

Reported by Usha Thiagarajah

JUDGMENT

Nik Hashim J:

The plaintiff, Daewoo Corporation, applied by way of this Originating Summons (the 2nd OS) for the following:

(a) a declaration that Mr. John L. Lim, the Arbitrator, in the arbitration between the plaintiff and the defendant (Bauer (Malaysia) Sdn. Bhd.) does not possess the jurisdiction to adjudicate the disputes between the plaintiff and the defendant in respect of the four (4) work orders: PRP-A-005, PRP-A022, PRP-A-026 and PRP-A-037 (the 4 work orders);

(b) an order that Mr. John L. Lim and the defendant be restrained and that an injunction be granted restraining them from proceeding further with the arbitration in respect of the 4 work orders;

(c) that the defendant shall pay the plaintiff the costs of and occasioned by this application.

The grounds of this application that Mr. John L. Lim does not have jurisdiction or power to adjudicate on the dispute between the plaintiff and the defendant in relation to the above-mentioned work orders are explained in the affidavit of Ng Ho Fatt, the general manager of the plaintiff.

The plaintiff is the main contractor and the defendant is the subcontractor in respect of the 13 work orders. Disputes and differences had arisen between the parties on the 13 work orders and these were referred to arbitration under cl. 34 of PAM Conditions of Contract. The defendant called for arbitration over all the work orders in one single notice. The President of PAM had appointed Mr. John Lim as the arbitrator. It was a single appointment and covered all the 13 work orders. The plaintiff had challenged the jurisdiction of the arbitrator in respect of the 8 work orders on ground of want of an arbitration agreement and on the ground that the appointment of the arbitrator did not extend to the 8 work orders. The court on 26 December 1998 in O.S. No. R3-24-36-98 (the 1st O.S.), after noting the application of the arbitration cl. 34 to the work order PRP-A-008, gave judgment to the plaintiff and ruled that the arbitrator has no jurisdiction to arbitrate the 8 work orders. It is to be noted however, that in the 1st O.S. the plaintiff applied for and obtained a single injunction for all the 8 work orders. The application was limited to

the 8 work orders and did not include the remaining 4 work orders, even although the 4 work orders had emerged in the course of hearing of the 1st O.S.

Mr. R.R. Sethu, learned counsel for the defendant, in his preliminary objection to the 2nd O.S. contends that the plaintiff is barred by *res judicata* or issue estoppel in the wider sense from bringing the present 2nd O.S. in respect of the 4 work orders when the plaintiff could have included these 4 work orders in the 1st O.S. on the ground that the present 4 work orders form the subject matter of the same arbitration as the 8 work orders which were the subject matter of the 1st O.S. Counsel submitted that the 2nd O.S. is an abuse of process and ought to be dismissed in limine and cited the rule in *Henderson v. Henderson* [1843] 3 Hare 100 in support.

In reply, Mr. M.K. Chen, learned counsel for the plaintiff submitted that the defendant cannot raise the plea as the defendant has taken another step in that:

(i) the defendant had filed unconditional appearance;

(ii) the defendant had filed a notice of counterclaim; and

(iii) the defendant had filed an affidavit on merits before filing the affidavit raising the plea of *res judicata* in the wider sense.

In my view, the above three matters filed by the defendant do not constitute a fresh step in the proceedings that debars the defendant from challenging the validity of the plaintiff's 2nd O.S (see *Eagle Star Insurance Co. Ltd. v. Yuval Insurance Co. Ltd.* [1978] Vol. 1. Part 4, 357). The defendant, by filing, did not waive its right to challenge the plaintiff's 2nd O.S. as the basis of the defendant's preliminary objection is grounded on the plaintiff's abuse of process by filing the 2nd O.S. and this abuse is founded on public policy in preventing multiplicity of actions, it being in the public interest that there should be an end to litigation, (see *Talbot v. Berkshire County Council* [1993] 4 All ER 9 CA). Unlike private interest, there can be no estoppel or waiver of any matter founded on public policy such as abuse of process. It is the inherent jurisdiction of the court to deal with an abuse. Once an abuse of process is established the court is empowered to dismiss the action or stay proceedings or strike out the defence, as the case requires (see *Superintendent of Pudu Prison & Ors v. Sim Kie Chon* [1986] 1 MLJ 494). The defendant's counterclaim is a separate and independent action of the plaintiffs claim. The defendant is asking for the opposite relief and it is therefore, not an affirmation of the correctness of the plaintiff's claim. Likewise, the act of filing of the affidavits by the defendant. The defendant's affidavits disputing on the merits and raising the preliminary issue are filed with a purpose, that is, to dismiss the 2nd O.S. Having so decided, I now turn to the other grounds as advanced by the plaintiff's counsel.

a It is the submission of the learned counsel for the plaintiff that the doctrine of *res judicata* or issue estoppel in the winder sense is not applicable in this case because the 2nd O.S. is based on subject matter and facts which are materially different from those of the 1st O.S. The 2nd O.S. relates to 4 work orders which are separate and distinct contracts with different causes of action b from the 8 work orders in the 1st O.S. The subject matter is entirely different. There is no duty on the plaintiff to bring all its causes of action in one proceeding. Further, counsel argues that the doctrine can only be invoked against the litigant who lost the first proceeding. As the plaintiff won the 1st O.S., the said doctrine cannot apply to the plaintiff.

c The doctrine that a party may be shut out from raising in a subsequent action an issue which he could, and should have been raised in earlier proceedings is contained in the judgment of Wigram VC in Henderson where at p. 114 he stated:

> d ... where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which **might** have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, e from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to **every point which properly belonged to the subject of litigation**, and which the parties, exercising reasonable diligence, **might have brought** forward at the time. (Emphasis added)

f The above principle was enlarged in *Greenhalgh v. Mallard* [1947] 2 All ER 255, where Somervell LJ at p. 257 said:

> ... res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but ... it covers **issues or facts which are so clearly** g **part of the subject matter of the litigation and so clearly could have been raised** that it would be an abuse of the process of the Court to allow a new proceeding to be started in respect of them. (Emphasis added).

The Privy Council in *Yat Tung Investment Co. Ltd. v. Dao Heng Bank Ltd.* [1975] AC 581 in reaffirming the principle in Henderson states at p. 590:

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> But there was a wider sense in which the doctrine might be appealed to, so that **it became an abuse of process to raise in subsequent proceedings matters which could and** therefore **should have been litigated in earlier proceedings**. (Emphasis added).

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The classic principle in *Henderson* was quoted with approval and was explained by the Supreme Court in *Asia Commercial Finance (M) Bhd. v. Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 and the Federal Court in *Kluang Wood Products Sdn Bhd & 1 lagi v. Hong Leong Finance Bhd & 1 lagi*, Rayuan Sivil No. 02-287 Tahun 1994 dated 24 October 1998 (yet to be reported).

The Supreme Court in *Asia Commercial Finance* extended *res judicata* in the wider sense to apply even to different causes of action. YA Peh Swee Chin FCJ in delivering the judgment of the court said at p. 299 para. B:

> In order to prevent multiplicity of action and also in order to protect the underlying rationales of estoppel *per rem judicatum* and not to act against them, such **estoppel of cause of action has been extended to all other causes of action (based on the same facts or issues) which should have been litigated or asserted in the original earlier action** resulting in the final judgment and which were not, either deliberately or due to inadvertence. (Emphasis added.)

The plaintiff's counsel says the above statement in *Asia Commercial Finance* was *obiter*. I do not agree. The issue of *res judicata* by way of a cause of action estoppel formed the crux of the decision of the appeal in *Asia Commercial Finance*. This can be seen clearly in the opening paragraph of the judgment where the Supreme Court restates the law on *res judicata*.

In the present case, the question is whether the issues raised in the 2nd O.S. are matters which could and should have been litigated in the 1st O.S.

Having regard to the two O.Ss. it is crystal clear that the 4 work orders in the 2nd O.S. are based on the same issue concerning arbitration between the same parties: the defendant and the plaintiff. The President of PAM appointed the arbitrator Mr. John L. Lim for all the 13 work orders (PRP-A-008, 1st O.S. 8 work orders and 2nd OS 4 work orders) under a single letter of appointment. If the 8 work orders which are separate contracts could be litigated in one proceeding under the same subject matter of arbitration in the 1st O.S., I fail to understand why the 4 work orders in the 2nd O.S., even though they are claimed to be separate contracts and therefore separate causes of action, could not also be included in the 1st O.S. The plaintiff had expressly referred the 4 work orders in the 1st O.S. yet it failed to claim any relief for these 4 work orders and no reason was offered for the failure. These 4 work orders had emerged during the hearing of the 1st O.S. Thus, the inclusion of the 4 work orders in the plaintiff's affidavit in the 1st O.S. is conclusive that the plaintiff treated the 4 work orders as forming part of the same subject matter of the 1st O.S. Therefore, since the 4 work orders had arisen in the earlier proceedings, they should have been brought forward and grafted in the 1st O.S., and the relief should have been claimed accordingly. In *Divine-Bortey v. Brent London Borough Council*, The Gazette 3 June 1998, 29, the applicant

brought industrial tribunal proceedings against the council alleging that he had been unfairly selected for redundancy. In the course of the tribunal proceedings it emerged that the applicant's African accent might have had a bearing on his dismissal. The tribunal dismissed the claim for unfair dismissal so the applicant made a fresh complaint alleging racial discrimination. That claim was dismissed by a tribunal chairman on the ground that the matter was *res judicata*. The applicant's appeal was allowed on the ground that there was no issue of estoppel because the first tribunal had not addressed the racial issue and the second tribunal had not considered the special circumstances of the case. The council appealed. The appeal was allowed. It was held that the rule in *Henderson* that parties to litigation must bring forward their whole case and would not, except in special circumstances, be permitted to open the same subject of litigation in respect of matter which might have been litigated but had been omitted due to negligence, inadvertence or even accident, applied to industrial tribunal proceedings; that there were no special circumstances in this case because the tribunal had found that the redundancy procedures were fair, leaving little room for a finding of racial discrimination; and that when the racial issue had arisen in the first proceedings it should have been grafted onto the original application.

The 1st O.S. was initiated by the plaintiff and it had control over it. It is, therefore, the duty of the plaintiff to join all causes of action against the defendant in a single action (see O. 15 r. 1(1)(a) of the Rules of the High Court (RHC). Further, the plaintiff could have applied to amend the 1st O.S. to include the present 4 work orders but it did not do so. The plaintiff could have taken out a second O.S. for the 4 work orders and have them consolidated (See O. 4 r. 1(1) of the (RHC) and argued at the same time as the 1st O.S. This course, too, was not adopted by the plaintiff.

At the outset, the plaintiff contends that the doctrine of *res judicata* in the wider sense does not apply to the present case as the 4 work orders in the 2nd O.S. are different contracts and causes of action from the 8 work orders in the 1st O.S. and quoted *New Brunswick Railway Company v. British and French Trust Corporation, Ltd* [1939] AC 1 in support. There, the first proceeding concerned the construction of a bond, whereas the second proceeding concerned the constructions of other similar bonds. The court held that *res judicata* did not apply. On a closer scrutiny of the case, I agree with counsel for the defendant that the case concerns *res judicata* in the narrow sense and therefore distinguishable from the present case.

With regard to the plaintiff's second argument that the doctrine can only be invoked against the losing party, I hold that the argument has no merit. The doctrine of abuse applies equally to each party. The role of parties, be that of the plaintiff or defendant, and the success or failure of that party is not

the basis for the operation of the doctrine. In *Brisbane City Council v. Attorney General for Queensland* (P.C.) [1978] 3 WLR 299, the Privy Council stressed on a "party" not whether the party was successful or not in the earlier proceedings. Thus, the test of the doctrine is **"might or could and should the issue have been raised by a party in the earlier proceeding?"** In the instant case, the defendant, though a losing party in the 1st O.S., can raise the question of abuse against the plaintiff's failure to include the 4 work orders in the 1st O.S. In my view, the defendant is right in raising the question.

It is my judgment that the issue of the 4 work orders in the 2nd O.S. so clearly could and should have been raised in the 1st O.S. The issue in the 2nd O.S. is common and properly belonged to the subject matter of litigation in the 1st O.S. in that whether Mr. John L. Lim, the arbitrator, appointed under a single notice (covering 13 work orders including the present four) has the jurisdiction to arbitrate the disputes between the same plaintiff and defendant. Failure to include these 4 work orders for adjudication in the 1st O.S. attracts the rule in *Henderson* and hence it becomes an abuse of process of the court to raise the 4 work orders in subsequent proceedings in the 2nd O.S. In the event, the plaintiff is barred from bringing the 2nd O.S. The present O.S. is governed by *Asia Commercial Finance* which decision binds this court. Since Asia Commercial Finance does not recognise the exceptions to the rule, the plaintiff is not entitled to rely on the special circumstances proviso in Henderson. Even if the plaintiff was entitled, the plaintiff has not, and on the facts cannot, invoke the exception.

In the premises and for reasons above-mentioned, I hold that the 2nd O.S. is clearly an abuse of process of the court and I therefore, cannot allow it to be litigated again. Accordingly, the defendant's preliminary objection is allowed and the plaintiff's 2nd O.S. (encl. 2) is struck out with costs. The defendant's counterclaim (encl. 5) is set for trial to a date to be fixed.